IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1382

RAYMOND A. KLEMMER

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

## BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

WILLIAM J. BAXLEY
Attorney General of Alabama

DAVID W. CLARK
Assistant Attorney General
of Alabama

Counsel for Respondent

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1382

RAYMOND A. KLEMMER

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

## BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## BRIEF AND ARGUMENT FOR RESPONDENT

### I

### OPINIONS OF THE COURT BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

*Raymond A. Klemmer v. State of Alabama*, 5th Division, 92, ____ Ala. App. ____, 286 So.2d 58, cert. denied 286 So.2d 62.

## II

## JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Criminal Appeals of Alabama rendered on August 14, 1973. Application to the Court of Criminal Appeals of Alabama for rehearing was denied on September 25, 1973. A petition to the Supreme Court of Alabama for writ of certiorari was denied on December 13, 1973. Petitioner applies under the provisions of Title 28, Section 1257 (3), United States Code.

## III

## QUESTION PRESENTED

Whether there is a substantial federal question suitable for review where the Petitioner is seeking review of a state decision on a question of state law based on sufficiency of the evidence?

## IV

## CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution of the United States, Section 1.

## V

## STATEMENT OF THE CASE

The Statement of the Case contained in the petition is substantially correct and is adopted herein by reference.

## VI

Absence of a substantial federal question precludes review by this Honorable Court.

## VII

## ARGUMENT

Petitioner argues in his petition approximately the same things which he argued before the Court of Criminal Appeals of Alabama, that is: (1) sufficiency of the evidence to support the charge of grand larceny and (2) was the oral charge that "the unexplained possession of recently stolen goods is a fact from which a jury may infer guilt" proper in view of the evidence.

It should be pointed out that petitioner conveniently points out only that he was in the car momentarily in the police parking lot and that this was not sufficient possession to satisfy requirement of a grand larceny conviction. He overlooks testimony of James H. Yarnell, Assistant Manager of Bill Heard Chevrolet that the car had been missing from the lot and was returned by the Opelika Police Department. (R. pp. 19 and 23, 24); also of Otis Daniel, who ran the storage lot from which the car was stolen (R. pp. 24-28); that petitioner brought the stolen car into Jack Tatum's Chevrolet for repairs on April 14, 1971 (R. p. 41) and that he was apprehended in the act of removing it from the impounding lot of the Opelika Police Department where it had been parked.

Thus it can readily be seen from the above and from the summary of evidence in the opinion that the State made out a case of grand larceny against petitioner as required by Title 14, Section 331, Code of Alabama 1940, as amended. The

evidence was properly submitted to the jury by the court. *Johnson v. State*, 41 Ala. App. 351, 132 So.2d 485.

*Arthur v. State*, 38 Ala. App. 490, 93 So.2d 793 held:

> "Moreover, if the prospective thief shall have obtained at some time the complete, independent and absolute possession and control of the chattel, adverse to the rights of the owner therein, the taking is complete. 36 Civ. p. 748, Section 45 (3). And 'a very slight asportation will be deemed sufficient.' Molton v. State, 105 Ala. 18, 16 So. 795, 53 Am. St. Rep. 97 . . ."

Possession of recently stolen goods, without a reasonable explanation is a fact from which the jury may infer guilt. The reasonableness of the possessor's explanation is for the jury. *Dickey v. State*, 32 Ala. App. 413, 26 So.2d 532, *U.S. v. McGlomary*, 441 F.2d 130 (1971).

The above principle has been adhered to in both State and Federal courts and raises no federal question.

The Alabama Court of Criminal Appeals was applying Alabama law to decide whether Petitioner was properly tried when he was found guilty of grand larceny. The elements of this crime are set out by Title 14, Section 331, Code of Alabama 1940, as amended. Neither the sufficiency of the evidence or the trial court's charge thereon presents a substantial federal question for this Honorable Court to review.

The absence of any substantial federal question precludes review by the Supreme Court of the United States in this case. *Sawyer v. Piper*, 189 U.S. 154, 25 S.Ct. 633, 47 L.Ed. 757; *New Orleans v. New Orleans Waterworks*, 142 U.S. 79, 12 S.Ct. 142, 35 L.Ed. 943.

## VIII

## CONCLUSION

For the foregoing reasons, respondent submits that petitioner was indicted, tried and sentenced properly and that the constitutional rights of said petitioner were not violated. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General of Alabama

DAVID W. CLARK
Assistant Attorney General
of Alabama

250 Administrative Building
Montgomery, Alabama 36104
Counsel for Respondent

## IX

## CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of April, 1974, I served three copies of the foregoing brief and argument of respondent in opposition to petition for writ of certiorari upon the attorney for petitioner, by mailing said copies in a duly addressed envelope to said attorney of record as follows:

J. Paul Lowery
Suite 800 — Bell Building
Montgomery, Alabama 36101

DAVID W. CLARK
Assistant Attorney General
of Alabama

250 Administrative Building
Montgomery, Alabama 36104